

1 ROBERT S. ARNS (#65071, rsa@arnslaw.com)
JONATHAN E. DAVIS (#191346, jed@arnslaw.com)
2 STEVEN R. WEINMANN (#190956, srw@arnslaw.com)

THE ARNS LAW FIRM

3 515 Folsom Street, 3rd Floor
San Francisco, CA 94105
4 Tel: (415) 495-7800
5 Fax: (415) 495-7888

6 JONATHAN M. JAFFE (# 267012, jmj@jaffe-law.com)

JONATHAN JAFFE LAW

7 3055 Hillegass Avenue
Berkeley, CA 94705
8 Tel: (510) 725-4293
Fax: (510) 868-3393

9 Attorneys for Plaintiffs

10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 ANGEL FRALEY; PAUL WANG; SUSAN
15 MAINZER; JAMES H. DUVAL, a minor, by
and through JAMES DUVAL, as Guardian ad
16 Litem; and W.T., a minor, by and through
RUSSEL TAIT, as Guardian ad Litem;
17 individually and on behalf of all others similarly
situated,

18 Plaintiffs,

19 v.

20 FACEBOOK, INC., a corporation; and DOES 1-
21 100,

22 Defendants.

Case No. 11-cv-01726 RS

**FRALEY PLAINTIFFS’
OPPOSITION TO MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED**

Courtroom: 3

Judge: Hon. Richard Seeborg

Trial Date: None

I. INTRODUCTION

Plaintiffs in *Fraleley, et al. v. Facebook, Inc.* (No. 11-cv-01726 RS) bring this Opposition to Lucy Funes' Administrative Motion to Consider Whether Cases Should Be Related Pursuant to Civil Local Rule 3-12 and 7-11 ("Motion to Relate") as the facts and issues in *Funes, et al. v. Instagram, Inc., and Instagram, LLC.* (No. 12-cv-6482-NC) do not meet the requisite criteria for relation under Local Rule 3-12.

On December 21, 2012, Lucy Funes filed a class action lawsuit against Instagram Inc. and Instagram, LLC ("Instagram") on the basis, in part, that Instagram's anticipated changes to its Terms of Service could possibly result in Instagram users' names and/or likenesses appearing in advertising. Motion to Relate 1:19-23. On December 27, 2012, Funes filed the Motion to Relate, with the primary assertion seeming to be that the *Funes* case is related to *Fraleley* "because Facebook Inc. is the parent company of Instagram, and the case involves similar wrongful acts and occurrences, namely the misappropriation of member photographs for commercial purposes." Motion to Relate 1:24-26, emphasis added. This, however, is insufficient to meet the requisite criteria for relation under Local Rule 3-12. *Fraleley* has essentially no overlap with *Funes*. *Funes* involves only the Instagram service, whereas *Fraleley* involves nationwide class of all Facebook Members who have had Sponsored Stories created using their names and likeness. The parties, alleged actions and property involved, as well as the damages and relief sought are not the same. Further, relating these cases right as the *Fraleley* notice of settlement is being received by the *Fraleley* class members may inject unrelated issues and create undue confusion in the Class. Accordingly, the Motion to Relate should be denied.

II. FRALEY AND FUNES ARE DISSIMILAR CASES WHICH DO NOT MEET THE REQUIREMENTS FOR RELATION UNDER LOCAL RULE 3-12

Civil Local Rule 3-12 defines actions as being related to another when: (1) the actions concern substantially the same parties, property, transaction or event; and (2) it appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges. None of those criteria are met here.

A. *Fraley* Does Not Concern Substantially The Same Parties, Property, Transaction Or Event As The *Funes* Matter

First, *Fraley* and *Funes* do not concern the same defendants. Facebook's connection to the case is simply that it is the parent company of Instagram. Defendants identified in the *Funes* complaint are Instagram, Inc. and Instagram, LLC. Facebook is not a named defendant in the *Funes* complaint. Facebook is only mentioned in passing in the *Funes* complaint, by way of example as to where Instagram photographs might be shared. *Funes* complaint ¶14. Conversely, Instagram is not mentioned at all in any version of the *Fraley* complaint.

The conditionally certified Class in *Fraley* and putative class in *Funes* are also different and not co-extensive. *Funes* seeks to represent "[a]ll natural persons who, while residents of the State of California, maintain an active Instagram account subject to Instagram's Terms in effect prior to January 19, 2013, containing at least one photograph of the owner of the account." (*Funes* Complaint, ¶ 22.) *Fraley* on the other hand is related solely to members of Facebook that have appeared in Sponsored Stories. See Declaration of Steven R. Weinmann ("Weinmann Decl.") ¶ 2. Although it is possible that an individual could be a member of both Instagram and Facebook, and there are likely a significant number of *Fraley* Class members who have Instagram accounts, there is no requirement that an individual join one to use the other. That is, individuals can use these services completely separately from one another.

Similarly, the "transaction," and/or property right (right to recovery for the right of publicity) asserted in each case is also very different. Plaintiffs in *Fraley* seek recovery of profits and lost monies arising out of Sponsored Stories appearing on Facebook only; *Funes* damages relating to right of publicity appear to be future damages resulting from a yet-to-be-implemented advertising scheme on Instagram.¹ Further, the Terms of Use for Facebook are considerably different from both those currently in effect for Instagram as well as Instagram's proposed Terms of Use about which *Funes* complains. Weinmann Decl. ¶3 and *Funes*

¹ It should be noted that the advertising scheme anticipated by the *Funes* complaint (one that uses Instagram user photos as part of an advertisement without consent), according to Instagram's December 18, 2012 press release, is not currently planned for implementation by Instagram. *Funes* Complaint ¶ 18

1 Complaint Exs. A and B. *Fraley* complains of lack of consent to appear in Sponsored Stories
 2 on Facebook; *Funes* is related to Instagram and its terms only. There is therefore no evidence
 3 that *substantially* the same *parties, transactions, or property* are in play in the respective
 4 Classes and claims in the actions, and L.R. 3-12(a)(1) is not satisfied.

5 **B. There Is No Danger Of Unduly Burdensome Duplication Of Labor And**
 6 **Expense Or Conflicting Results If The Cases Are Not Related**

7 Local Rule 3-12 also requires that it is likely that there will be an unduly burdensome
 8 duplication of labor and expense or conflicting results if the cases are conducted before
 9 different judges. *Funes* fails to supply any support for the contention that there is *any* risk of
 10 unnecessary burden or conflicting results if the cases are not related, let alone that they appear
 11 *likely*. In an attempt to support the Motion to Relate, *Funes* claims the following are similar
 12 questions of law and fact in both *Funes* and *Fraley*:

- 13 • Whether the defendants' commercial exploitation of members' photographs and
 14 likenesses is a violation of California Civil Code section 3344;
- 15 • Whether defendants' commercial exploitation of members' photographs and
 16 likenesses is an unfair and/or unlawful business practice under California's Unfair
 17 Competition Law, CAL. BUS. & PROF. CODE section 17200, et seq.;
- 18 • Whether the defendants should be permanently enjoined from engaging in such
 19 business practices.

20 Motion to Relate, page 2.

21 These contentions ignore the fact that the defendants in *Fraley* and *Funes* are different
 22 entities with different Terms of Use governing the relationship with their respective users.
 23 Thus, the only similarity that remains is that each complaint contains causes of action that arise
 24 from the same code sections: Civil Code section 3344 and Bus. and Prof. Code section 17200
 25 et. seq. As there are no factual similarities (e.g., same Terms of Use, same website, etc.)
 26 relating these cases is no more necessary or appropriate than relating two distinct real property
 27 disputes in separate parts of the state simply because they implicate the same code section.

1 Funes has also offered no support that there is any danger of duplication of labor and
2 expense. There is no such danger here due to of the significant factual distinctions between the
3 cases, as the cases deal with different defendants, different events, different Terms of Use, and
4 different websites/services. *See, e.g., Funes* Complaint at ¶¶ 15-21, Exs. A, B; *Fraley* Second
5 Amended Complaint at ¶¶ 31-32 (different terms of use). There is no risk of undue or
6 duplicative discovery—the cases have different allegations of law and fact and concern
7 different corporate defendants. Further, in *Fraley*, all dispositive motions, the Motion for Class
8 Certification as well as the first Motion for Preliminary Approval of Settlement, and related
9 discovery took place *prior* to the approval from the Federal Trade Commission for Facebook to
10 acquire Instagram. Weinmann Decl. ¶ 4. Further, the Motion for Preliminary Approval was
11 entered by the court prior to Instagram's announcement of its planned new Terms of Use. *See*
12 Weinmann Decl. ¶2 and Ex. 2, and ¶17 of the *Funes* Complaint. As result, the *Fraley* matter
13 does not address the recent actions of Instagram at this time.

14 In this instance, unduly burdensome and unnecessary duplication of labor and expense
15 may result if the cases are related. *Fraley* has already proceeded to the point of Preliminary
16 Approval of the Settlement and is on the eve of notice being sent to the Class. At the present
17 time, no discovery is even being conducted in *Fraley*. Thus, the additional effort required of
18 counsel in *Fraley* to monitor the *Funes* matter despite its inapplicability to the *Fraley* action
19 would in and of itself be wasteful. Further, relating the cases could potentially and
20 unnecessarily confuse members of the *Fraley* Class during settlement process. Nor does there
21 appear from the allegations in the *Funes* Complaint to be any risk of conflicting rulings given
22 the differences in the parties and factual circumstances.

1 **III. CONCLUSION**

2 For all the foregoing reasons, the Motion to Relate should be denied.

3
4 By /s/Steven R. Weinmann

5 ROBERT S. ARNS
6 JONATHAN E. DAVIS
7 STEVEN R. WEINMANN
8 **THE ARNS LAW FIRM**
9 515 Folsom Street, 3rd Floor
10 San Francisco, CA 94105
11 Tel: (415) 495-7800
12 Fax: (415) 495-7888

13 --and--

14 By /s/Jonathan M. Jaffe

15 JONATHAN M. JAFFE, ESQ.
16 (# 267012, jmj@jaffe-law.com)
17 **JONATHAN JAFFE LAW**
18 3055 Hillegass Avenue
19 Berkeley, CA 94705
20 Telephone: (510) 725-4293

21 Attorneys for Plaintiffs

ATTESTATION (CIVIL LOCAL RULE 5-1(i)(3))

In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from the signatory.

THE ARNS LAW FIRM

By /s/ Robert S. Arns
ROBERT S. ARNS

Attorneys for Plaintiffs